D.P.U. 95-DS-5

Adjudicatory hearing in the matter of a possible violation of G.L. c. 82, § 40, by Pitt Construction Corporation, Woburn, MA.

APPEARANCES: Robert E. Lee, Jr.
Pitt Construction Corporation
3 Baldwin Green Common, Suite 301
Woburn, Massachusetts 01801
RESPONDENT

Gail J. Soares, Dig-Safe Investigator
Division of Pipeline Engineering and Safety
Department of Public Utilities
Boston, Massachusetts 02202
FOR: DIVISION OF PIPELINE ENGINEERING AND SAFETY

I. INTRODUCTION

On February 24, 1995, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to Pitt Construction Corporation ("Respondent") of Woburn, Massachusetts. The Respondent is a sub-contractor hired by N.M. Construction, the general contractor of R.K. Plaza at 197 Boston Post Road ("site") in Marlboro (Tr. at 42). The Respondent was hired to do "earth work", that is, excavation and grading on the site (id.).

The NOPV stated that the Division had reason to believe that on January 20, 1995, the Respondent had performed an excavation on the site without complying with the provisions of G.L. c. 82, § 40, known as the "Dig-Safe Law". The purpose of the Dig-Safe law is to protect utility service from disruption and damage in the course of excavations in the area of the utility service lines. To discharge this purpose, 220 C.M.R. §§ 99.00 et seq. set out the procedure which requires a contractor to notify utility companies of intention to excavate at a specific location, and requires utility companies to respond to the notice of intent to excavate by marking the location of utility service lines. The NOPV issued to the Respondent stated that Commonwealth Gas Company ("Company") alleged that the Respondent failed to give proper notification to the Company, which maintains and operates an underground utility on the site,

and failed to exercise reasonable precaution, which resulted in damage to the underground utility.

The NOPV advised the Respondent that it had a right to appear at an informal conference on March 23, 1995, or to reply to the allegation in writing on or before March 23, 1995. The Respondent replied in writing on March 1, 1995 stating that it had two Dig-Safe numbers for the site and that it performs its work with caution (Exh. Division-5). On September 6, 1995, the Division issued a second NOPV informing the Respondent that, based on the reply of March 1, 1995, the Division determined that the Respondent had violated the Dig-Safe Law and would be held liable for a civil penalty of $200.00. The Respondent was advised that if it did not concur with the determination of the Division it had the right to request an adjudicatory hearing. On September 14, 1995, the Respondent requested an adjudicatory hearing, pursuant to 220 C.M.R. § 99.07(3). The request was docketed as D.P.U. 95-DS-5. After due notice, a hearing was held on January 11, 1996 at the offices of the Department.

At the hearing, Gail J. Soares, a Dig-Safe investigator for the Division, appeared on behalf of the Division. John Dustin, superintendent of Technical Services of the Company, and Robert Smallcomb, the Department's Division Director, testified in support of the Division's case. Robert E. Lee, Jr., project engineer of the Respondent, testified on behalf of the Respondent. The Division offered eight exhibits into the record;

the Respondent offered one late-filed exhibit.

II. SUMMARY OF FACTS

A. The Division

Mr. Dustin testified that on December 13, 1994, the Company installed 420 feet of underground pipe to carry the Company's gas at the site in Marlboro (Tr. at 10, 12). On the morning of January 20, 1995, the Respondent, in the course of operating a backhoe to install a water line, damaged the Company's 2-inch intermediate pressure plastic gas main (Tr. at 7, 10; Exh. Division-3). The Company Report of Dig-Safe Violations and Damage to Underground Facilities submitted to the Department on January 20, 1995, stated that there was no Dig-Safe number for the site, and alleged that notice of the excavation was not given to the Company as required by G.L. c. 82, § 40 (Tr. at 8; Exh. Division-1). Because the Company had not received a request to mark, the site was not marked at the time the Respondent began its work for the water line (Tr. at 8).

B. Respondent

Mr. Lee testified that the Respondent was installing a water line on the site on January 20, 1995, under Dig-Safe number 942800420 issued to it on July 11, 1994, when the backhoe operated by the Respondent damaged the Company's gas line. The Respondent asserted that it had been working on the site continuously since July 1994 and because of its ongoing presence at the site, did not believe it was required to request another Dig-Safe number (Tr. at 44-45, 48-49). Mr. Lee stated that the

Respondent did not know that the Company had installed the gas line when it began excavating on the site (id. at 66).

III. STANDARD OF REVIEW

G.L. c. 82, § 40 provides that:

> No person shall, except in an emergency, contract for, or make an excavation...in any public way, any public utility right of way or easement, or any privately owned land under which any public utility company, municipal utility department, natural gas pipeline company, or cable television company maintains underground facilities...unless at least seventy-two hours, exclusive of Saturdays, Sundays and legal holidays, but not more than thirty days, before the proposed excavation is to be made such person has given an initial notice in writing of the proposed excavation to such natural gas pipeline companies, public utility companies, cable television companies and municipal utility departments...in or to the city or town where such an excavation is to be made.
>
> ...
>
> ...The company shall respond...by designating at the locus, the location of pipes, mains, wires or conduits in that portion of the [property]...in which the excavation is to be made...
>
> ...
>
> ...After a company has designated the location... the excavator shall be responsible for maintaining the designation markings at such locus, unless the said excavator requests re-marking...due to removal of such markings...

Section 40 is clear. A company, contractor, or excavator has between 72 hours and 30 days before beginning to excavate on a specific site, to notify the appropriate utility companies with underground facilities on that site to mark the locations of the underground facilities. Construction Solutions, Inc. , D.P.U. 89-DS-17 (1993). Section 40 further specifies that once the marks have been placed, it is the responsibility of the excavator to

maintain the marks or, if the marks are no longer visible, to request that the site be remarked.

IV. ANALYSIS AND FINDINGS

At issue in this proceeding is whether the Respondent was required to obtain a Dig-Safe number for the excavation on January 20, 1995. This issue in turn raises the questions of what constitutes "continuous presence" and "control of a site" as these terms are used to validate continuing operation under an existing Dig-Safe number. See R.J. Cincotta Co., Inc. D.P.U. 91-DS-15 (1993); Boston Gas Company , D.P.U. 88-DS-30 (1990); Ramey Contractors-Engineers , D.P.U. 86-DS-133 (1987). In these cases the Department has consistently held that when a contractor maintains a continuous presence at a work site, additional notification beyond the original notice is not required as long as the marks placed after the original notification are evident. However, if a contractor leaves a site for a significant length of time or is forestalled from commencing work beyond the 30-day period, further Dig-Safe notification is necessary to ensure that original marks are still visible and that any recently installed facilities are properly marked.

The Division entered into evidence Dig-Safe ticket 942800420 ("July ticket") issued to the Respondent on July 11, 1994, requesting the marking of the entire site for the excavation for, and installation of utilities (Exh. Division-7). [1]

---

[1] The July ticket is accompanied by ticket 942806196, issued on July 14, 1994, called an amendment to the July ticket, noting that another subcontractor was working under the control of the Respondent in

Mr. Lee asserted that because the Respondent maintained control of the site from July 1994 through May 1995, the excavation for, and installation of the water line was allowed under the July ticket, which encompassed the entire site (Tr. at 61). However, Mr. Lee noted that the Respondent's work of excavating and grading was not performed every work day, but rather was performed at different times and at different locations on the site depending on the various stages of completion of the overall project. While explaining the site-wide work, Mr. Lee conceded that the work required the Respondent to leave and return to accommodate other site contractors. Mr. Lee noted that at one point the Respondent returned to the site after an absence of 40 days (id. at 57-58). During this absence, the Respondent was not continuously operating on the site and did not have control of the site. It was during the 40-day absence that the Company installed its gas line (id.). Because the Respondent was not on the site, the Respondent was not aware of

---

connection with the work of the July ticket (Tr. at 20-21; Exh. Division-&. Work under the amendment is not involved in the January accident.

Exh. Division-7 also includes ticket 944800930 issued November 28, 1994 ("November ticket") for the installation of a gate valve on a water line 35 feet off the pavement to the north of the site. Because the gate valve was not actually on the site covered by the July ticket, the Respondent requested the November ticket. The work performed under the November ticket was not connected with the work of excavating for the water line and the resulting January 1995 accident (Tr. at 52-56).

the Company's installation on December 13, 1994, when it excavated for the water line in January 1995.

The instant case illustrates the rationale for the statutory requirement that excavation begin within 30 days of issuance of a Dig-Safe ticket. According to Mr. Smallcomb, a contractor with a continuous presence, as opposed to a leaving-and-returning presence, is able to maintain the integrity of the marks. If excavation has begun and the marks are intact the Dig-Safe number is valid beyond 30 days (id.). However, once the marks are obliterated, or if a new utility line is installed and there are no marks, as in this case, the contractor has the responsibility of asking that the site be remarked, or of asking for a new number (id. at 36).

Mr. Smallcomb testified that in his opinion, the installation of a gas line five months after the Respondent requested the July ticket created a new situation which would require a new request to mark the utility (id. at 23). Mr. Smallcomb pointed out that the excavation could not be validated by the July ticket because the gas line did not exist when the July ticket was issued (id. at 32). The Company had no service line to mark in July, and therefore no marks were placed. A utility has no obligation, under either the statute or the regulations, to anticipate site work, or to mark a location on a site, unless and until it is properly notified under the Dig-Safe procedure. A contractor has the sole responsibility of

requesting utilities to mark the location of their services.

The Department finds that the Respondent was in error in assuming that the July ticket allowed for a January excavation under the circumstances of this case. The January excavation was not authorized by the July ticket because the Respondent did not maintain a continuous presence at the site, and was not in control of the site. Because the gas line did not exist at the time of the issuance of the July ticket, the July ticket could not authorize a January excavation which would require a separate marking. Although the Respondent began excavating at some location on the site within 30 days of the issuance of the July ticket, the Respondent did not begin excavating at the location of the gas line before the expiration of the 30 days. Although the Respondent operated on several projects throughout the overall site it was not aware of all of the projects on the entire site. The Respondent concedes that it did not know that the gas line was installed.

Therefore, the Department finds, based on the testimony of the Respondent's witness, that the Respondent violated the Dig-Safe Law by failing to request a new Dig-Safe ticket, and that the violation resulted in damage to the Company's utility service.

This is the first Dig-Safe violation by the Respondent. The Department therefore finds that the Respondent shall be subject to the minimum penalty of $200.00 for this violation.

V. ORDER

Accordingly, after due notice, hearing and consideration, it is

FOUND: That Pitt Construction Corporation of Woburn, Massachusetts violated the Dig-Safe Law when it failed to provide Dig-Safe notice pursuant to G.L. c. 82, § 40, relative to an excavation at 197 Boston Post Road in Marlboro, Massachusetts, on January 20, 1995; and it is

ORDERED: That Pitt Construction Corporation shall pay a civil penalty of $200.00 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities payable to the Commonwealth of Massachusetts, within thirty days of the date of this Order.

By Order of the Department,

_____
John B. Howe, Chairman

_____
May Clark Webster, Commissioner

_____
Janet Gail Besser, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec 5, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).